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IS A JUDGMENT OPEN TO COLLATERAL ATTACK IF  
RENDERED WITHOUT WRITTEN PLEADINGS AS  
REQUIRED BY STATUTE, OR IF THE WRIT-  
INGS DO NOT COMPLY WITH THE  
STATUTORY REQUIREMENTS?

**I**T is believed that no good reason can be assigned for answering the above question in the affirmative. Certainly none has yet been discovered in a careful search of the cases involving the point. And yet the assurance and unanimity with which lawyers and judges give the affirmative answer to it on first thought is indeed remarkable. For instance, Mr. Justice FIELD in speaking for the Supreme Court of the United States, on the question as to whether a judgment is subject to collateral attack if one served with process is not permitted to make any defense when he appears in answer to such process, said *arguendo*: "The decree of a court of equity upon oral allegations without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the chancellor."<sup>1</sup> He made the statement as if it were obviously true, and citation of authority was unnecessary and would be surplusage. He certainly cites no authority for his proposition, indeed there is none to cite; nor does he advance any reason to support his conclusion to that effect. Such judicial utterances as are to be found to this effect are of very much the same off-hand and ill considered sort. When the question came before the same court in a later case in which it was necessary to decide the question to dispose of the case, the same justice had no difficulty in reaching the opposite conclusion.<sup>2</sup>

On the other hand, why should a judgment be sustained against a collateral attack on the failure to file written pleadings or to allege such matter as the statute requires to be alleged?

1. Because the statute has not in terms declared that the judgment shall be open to such attack for the failure to comply with the statutory requirements; and it is much more probable that the legislative intent was either to prescribe a certain and convenient practice, whereby all might know one safe way to proceed, without in any manner trenching on the other proper methods of proceeding theretofore in vogue or permitted; or else that the legislative intent was to declare a right to the opposite party to insist on this one method of proceeding in exclusion of all other procedure, like the statutes

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<sup>1</sup> Windsor v. McVeigh (1876), 93 U. S. (3 Otto) 274, 283.

<sup>2</sup> Hall v. Law (1880), 102 U. S. 461, 463.

which declare that parties shall be competent witnesses in their own behalf, or that witnesses who would be infamous by the common law shall be competent, and evidence of their infamy shall be admissible merely to discredit their testimony. Who would suppose that a judgment would be void on collateral attack because the court erred in excluding such evidence, whereby the defeated party was unable to prove his case or defense, wherefore the judgment was rendered against him? A party aggrieved by such a ruling would be supposed by all to be bound by the judgment if he took no appeal from it or assigned no error on the ruling. Suppose that a statute should declare that a party should not be liable on an oral promise in certain cases, and suit is brought on such a promise, in such a manner that the nature of the case appears on the face of the pleadings, would anyone suppose that a judgment sustaining the complaint on demurrer was void and open to collateral attack because the judge erred in sustaining the complaint? If such were the law, a demurrer would be an idle thing; as well treat the whole proceeding with contempt. Else if a demurrer were sustained when it should not be, the judgment would always be void. Not so; power to decide includes power to decide the wrong way as well as the right, else it is no power at all.

2. Because, as already suggested, judgment that plaintiff recover includes in it an adjudication that his complaint states a cause of action. If the complaint be oral, judgment for the plaintiff necessarily adjudicates that the complaint is sufficient. It is *res adjudicata* on that point till vacated. What has been decided is not open to dispute.

3. Because all matter of form is merely for the convenience of the court and parties in expediting the trial, rendering the matters decided more certain, preserving the memory of them, or the like; and whatever is required for convenience may be waived.

4. Because there is nothing about the matter inherently requiring that the pleadings be written. Originally all proceedings in all courts were oral. When writing was first introduced it was in the form of memoranda made by the court and not of written pleadings by the parties. Written pleadings introduced merely by custom cannot be jurisdictional. To this day motions may be made in open court orally, and advantage of points taken by written pleadings may be orally waived at the trial in any court; whereby it is the same to all intents and purposes of record as if the pleadings were oral. In many inferior courts the pleadings are to this day all oral; and if an inferior court's decision without written pleadings is valid, certainly

the greater power and dignity of the superior courts does not render their similar proceedings void; indeed, when cases from such inferior courts come before a superior court for new trial on appeal, they are still heard in the superior courts on the same oral pleadings as were the basis of the hearing in the court below; if they can proceed on oral pleadings in some cases, similar proceedings in other cases can be no more than error. Even in the superior courts, the defendant's plea in criminal cases is still oral. If writing is not indispensable when life and liberty are involved judgments in civil cases should not be held subject to collateral attack for want of written pleadings. In the most important of all civil cases, ejectment to try title, the written pleadings in no just sense disclose the nature of the controversy.

5. Because subjecting judgments to collateral attack for want of written pleadings is to enable one to take advantage of a defect after he has waived it by proceeding without the writing when he might have objected, and would have done so if it had been of any advantage to him to have done so. To allow the objection now is to surrender justice for mere form. The public has already sufficiently lost its respect for the courts by seeing them defeat the purpose of their creation by betraying justice for form, and making the temple of justice a house of jugglery, where astuteness and sharp practice are permitted to defeat admitted rights. This public impression is not improved by the spectacle of a court solemnly adjudicating a thing today, and as solemnly declaring the next day that what it did before amounts to nothing. If courts would be respected by the public they must respect the proceedings of each other. If they would have a reputation for doing justice they must not make justice subservient to form, at least not to the extent of permitting collateral attacks to succeed when based solely on departures from prescribed form.

When a case was set for trial without filing the written reply to the supplemental answer, as required by statute, it was held there was no error in requiring the parties to proceed to trial over objection that there were no written pleadings as required by law, because they had waived the objection.<sup>3</sup> If it ever became too late to make the objection in the original suit itself, all the more, it could never be availed of for the purpose of a collateral attack.

In England a man was convicted of perjury in testifying against one on trial before a magistrate, for a statutory offense of which the magistrate was given cognizance by a statute by which the procedure

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<sup>3</sup> *Veysey v. Bernard* (1908), 49 Wash. 571, 95 Pac. 1096.

was prescribed to be by sworn information in writing. Appeal was taken from the conviction of perjury on the ground that the magistrate had no jurisdiction in the case in which the alleged false testimony was given, for the reason that there was no information in writing authorizing him to take cognizance of the case. In the court for crown cases reserved nine of the judges were of the opinion that absence of a written information did not go to the jurisdiction. KELLY, C. B., was of opinion that there was no perjury, because that crime can be committed only by giving false testimony concerning a matter material in a case in court; and here was no case in court since there was no charge in writing against the person on trial, and the magistrate was not authorized to proceed on any other sort of charge. In holding the contrary, HAWKINS, J., said: "I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any written information or oath to justify it, but without any information at all.\* \* \*Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, before these magistrates, and in his presence, a charge was made, over which if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded; and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. \* \* \* If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced, would be liable to be tried again, and could not plead *autrefois convict*; and if he had been acquitted would have been in no condition to plead *autrefois acquit*. Two very startling consequences. A flood of authorities might be cited in support of the proposition that no process at all is necessary, when, the accused being bodily before the justices, the charge is made in his presence, and he appears and answers it." In arguing to the same effect, HUDDLESTON, B., said: "In practice an information is never produced before the justices. If in writing it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is the nature of the charge. Sometimes where there is a charge sheet, as in the metropolitan district, reading from it,

otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states in fact the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it—or he may apply to adjourn or object to the jurisdiction. But if he make no objection, and here it is found that Stanley made no objection, the case must proceed. Principle and authorities seem to show that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance. The principle is, that a party charged should have an opportunity of knowing the charge against him, and be fully heard before being condemned. \* \* \* The arrest of Stanley was no doubt illegal, there had been no information or oath to justify the warrant, and it might be, that if the objection had been taken the magistrates might have entertained it; but they could then and there have issued their summons for Stanley's apprehension at once on a verbal information which would be good." In speaking to the same point, DENMAN, J., said: "If, as I suppose (and here I am putting the case as favorably as it can be put for the defendant), nothing more happened than that the magistrate inquired: 'What is the charge against that man?' And Hughes said in answer, 'I charge him with assaulting me, and obstructing me in the execution of my duty.' I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath and inquire into several matters upon any one of which the perjury might have been committed, wholly without reference to what they might in the result feel themselves bound to do or not to do."<sup>4</sup> In approving this decision in a later case on the same point, the same court said: "If one who may insist on it (a written charge) waives it, submits to the judge and takes his trial, it is afterwards too late for him to question the jurisdiction, which he might have questioned at the time."<sup>5</sup>

In Rhode Island a statute empowered the probate court of the county to authorize the administrator to sell land in certain cases, and prescribed that the administrator should file a petition in writing showing ground for such sale. An order of sale was made by a probate court on oral application by the administrator, and sale made accordingly: and the supreme court of the state held that the want

<sup>4</sup> *Queen v. Hughes* (1879), 4 Q. B. D. 614, 14 Cox Cr. Cas. 284, 40 L. T. 685, 48 L. J. M. C. 151, 29 Moak 67.

<sup>5</sup> *Dixon v. Wells* (1890), 25 Q. B. D. 249, 255.

of written petition was not jurisdictional.<sup>6</sup> The same was held by the supreme court of Florida.<sup>7</sup> And the contrary was held in Texas.<sup>8</sup>

An Indiana statute empowered the circuit court of the county where any land was situate to make partition thereof on application of any person interested. Such partition was made, and in a later case the proceeding was attacked collaterally because no complaint or petition of the applicant for partition appeared in the records, and without one the proceeding was void. The Supreme Court of the United States held the objection not well taken, saying: "The statute does not in terms require the application of the proprietor seeking a partition to be presented in writing, or, if one be presented, to be filed among the records of the court. All that it designates as necessary to authorize the court to act is, that there should be an application for the partition of one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication upon these matters. The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it had been given. This conclusion is not open to collateral attack; it can only be questioned on appeal or writ of error by a superior tribunal invested with appellate jurisdiction to review it."<sup>9</sup>

When it appeared on proceedings to revive against executors a judgment recovered against deceased that no declaration could be found, the Supreme Court of Pennsylvania treated it as if no declaration had ever existed, and held that if it was error, there having been no appearance by defendant in response to process, the judgment was not void, and allowed it to be revived. In North Carolina, on motion to vacate a judgment because there was no complaint in writing on which to render it, the court said: "Although regularly it ought to be in writing and filed at the commencement of the pleadings, and although we do not wish to be considered as favoring loose practice but the contrary, yet evidently by consent the complaint may

<sup>6</sup> *Robbins v. Tefft* (1878), 12 R. I. 67.

<sup>7</sup> *Emerson v. Ross* (1879), 17 Fla. 122.

<sup>8</sup> *Finch v. Edmonson* (1853), 9 Tex. 504.

<sup>9</sup> *Hall v. Law* (1880), 102 U. S. 461.

be waived, and judgment may be confessed or entered by consent. And even if the judgment for such cause were irregular, it is certainly not void."<sup>10</sup>

In sustaining a proceeding to revive a dormant judgment against demurrer on the ground that the petition on which the judgment was rendered did not state a cause of action, wherefore the judgment was void for want of jurisdiction, the Supreme Court of Missouri said in a recent case: "It goes without saying that such a judgment is binding and conclusive on the parties, and cannot be impeached for any defect in the pleading or proof; and that in a suit upon it the sufficiency of the petition on which it was rendered or the merits of the judgment cannot be inquired into."<sup>11</sup>

The defendant in ejectment claimed title under an administrator's deed, setting up and offering the record in such proceeding to prove his title. It appeared that an administrator petitioned for license to sell, which license was granted, but he did not sell, being unable to find a buyer. Later he resigned, his resignation was accepted, a successor appointed, and later the probate court made an order licensing the successor to sell without any petition for such license having been filed by him. It was objected that the order granting the last license was void, because made without petition therefor, and that the first license was void, and the sale thereunder void, because the petition therefor did not allege any statutory ground to authorize the court to grant such license. The Supreme Court of Nebraska held that no new petition was necessary, the new and old administrators being one person in law, and that the sufficiency of the petition was immaterial on collateral attack, saying: "The petition in our view, states sufficient to authorize the court to issue the license; but even if it did not, and the court would so hold in a direct proceeding to set it aside, yet where it has been acted upon as sufficient by the court having exclusive original jurisdiction of the subject-matter, it will be sustained in the court when collaterally attacked, where there was no collusion and fraud. The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale, and the sufficiency of the pleadings presented to the court for that purpose; and where it has jurisdiction, its orders and judgments are valid until set aside. There is nothing, therefore, in this objection. \* \* \* The original purchase price was used in paying their father's debts, and the purchaser should be protected. If this was not so, it

<sup>10</sup> *Leach v. Western N. C. Ry. Co.* (1871), 65 N. C. 486.

<sup>11</sup> *Holt County v. Cannon* (1893), 114 Mo. 514, 21 S. W. 851. To the same effect; *Koehler v. Holt Mfg. Co.* (1905), 146 Cal. 335, 80 Pac. 73; *Figge v. Rowlen* (1900), 185 Ill. 234, 57 N. E. 195.



would be impossible for an executor or administrator to sell real property belonging to the estate of the deceased for the payment of debts due from the estate, for any sum near its true value. No one but a speculator in disputed titles would care to invest in property the title to which might be overturned many years afterwards, and the effect would be to prevent competition, depress the value of the property, and, in many cases, deprive the creditors of their just dues.”<sup>12</sup>

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<sup>12</sup> *Trumble v. Williams* (1885), 18 Neb. 144, 24 N. W. 716.